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No. 130

In the Supreme Court of the United States

OCTOBER TERM, 1959

WILLIA NIUKKANEN, ALSO KNOWN AS WILLIAM NIUKKANEN, ALSO KNOWN AS WILLIAM ALBERT MACKIE, PETITIONER

v.

EUGENE D. MCALEXANDER, ACTING DISTRICT DIRECTOR, DISTRICT 31, IMMIGRATION AND NATURALIZATION SERVICE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

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BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the Court of Appeals (R. 91) is reported at 265 F. 2d 825.

JURISDICTION

The judgment of the Court of Appeals was entered on April 6, 1959 (R. 99). A petition for rehearing was denied on May 19, 1959 (R. 99). The petition for a writ of certiorari was filed on June 20, 1959, and was granted on October 12, 1959 (R. 100). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence at petitioner's deportation hearing was sufficient to show that he was an alien subject to deportation because, after entry into the United States, he had become a member of the Communist Party within the meaning of the Internal Security Act of 1950.

2. Whether the statute requiring the deportation of an alien because of membership in the Communist Party after entry is unconstitutional as a bill of attainder.

STATUTES INVOLVED

The Act of October 16, 1918, 40 Stat. 1012, as amended by Section 22 of the Internal Security Act of 1950, 64 Stat. 987, 1006, provided in pertinent part:

> [Sec. 1] That any alien who is a member of any one of the following classes shall be excluded from admission into the United States:
>
> * * * * *
>
> (2) Aliens who, at any time, shall be or shall have been members of any of the following classes:
>
> * * * * *
>
> (C) Aliens who are members of or affiliated with (i) the Communist Party of the United States* * *.
>
> * * * * *
>
> Sec. 4. (a) Any alien who was at the time of entering the United States, or has been at any time thereafter, * * * a member of any one of the classes of aliens enumerated in section 1(2) of this Act, shall, upon the warrant of the Attorney Gen-

eral, be taken into custody and deported in the manner provided in the Immigration Act of February 5, 1917. The provisions of this section shall be applicable to the classes of aliens mentioned in this Act, irrespective of the time of their entry into the United States.[1]

* * * * *

STATEMENT

Petitioner, a native and citizen of Finland, seeks review of the judgment of the Court of Appeals affirming a judgment of the District Court for the District of Oregon which denied him relief from an order directing his deportation on the ground that he is an alien who, after entry into the United States, had become a mem-

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[1] These provisions are now incorporated in Section 241 of the Immigration and Nationality Act of 1952 (8 U.S.C. 1251), which reads in pertinent part:

(a) General classes.

Any alien in the United States * * * shall, upon the order of the Attorney General, be deported who—

* * * * *

(6) is or at any time has been, after entry, a member of any of the following classes of aliens:

* * * * *

(C) Aliens who are members of or affiliated with (i) the Communist Party of the United States; * * *.

* * * * *

(d) Applicability to all aliens.

Except as otherwise specifically provided in this section, the provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a) of this section, notwithstanding (1) that any such alien entered the United States prior to June 27, 1952, or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a) of this section, occurred prior to June 27, 1952.

* * * * *

ber of the Communist Party within the meaning of the Act of October 16, 1918, as amended by Section 22 of the Internal Security Act of 1950, 64 Stat. 987, 1006 (*supra,* pp. 2-3).

1. *The proceedings*

On June 17, 1952, the District Director of the Immigration and Naturalization Service issued a warrant of arrest which recited that petitioner, who had entered this country on September 5, 1909, had been, after entry, a member of the Communist Party and was therefore subject to deportation (R. 5).[2] The warrant was served on September 12, 1952 (R. 5), and hearings were held before a special inquiry officer on May 11 and May 21, 1953 (R. 19). On June 30, 1953, the special inquiry officer specifically found that petitioner had been a member of the Communist Party during the years 1937 to 1939 and ordered his deportation (R. 17-18, 22-23, 47, 83, 95).

On petitioner's appeal from this order, the Board of Immigration Appeals found that the record established the stated ground of deportability by reasonable, substantial, and probative evidence, and accordingly dismissed the appeal on September 8, 1953 (R. 17-18, 83, 95).

On November 11, 1954, petitioner moved to reopen the proceeding in order that he might apply for suspension of deportation. This motion was denied on November 29, 1954, but, after being renewed, was

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[2] Since the Immigration and Nationality Act of 1952 was not enacted until later in June, and was not effective until December 1952, the warrant of arrest (and hence the proceedings as a whole) were instituted under the Act of October 16, 1918, as amended by Section 22 of the Internal Security Act of 1950.

granted on December 23, 1954 (R. 17-18, 84). On February 16, 1955, after a hearing, a special inquiry officer denied petitioner's application for suspension of deportation, finding that he had not made a "clean break" with the Communist Party and that there was reason to believe that he was still sympathetic with its principles. The Board of Immigration Appeals affirmed this order on May 13, 1955 (R. 17-23, 84).

While his application for suspension of deportation was pending, petitioner asked the District Court for a writ of habeas corpus, on December 13, 1954, alleging that the evidence against him did not support the order of deportation and that the statute under which the order was issued was unconstitutional in that it deprived him of due process under the Fifth Amendment, abridged his freedom of speech under the First Amendment, and was an *ex post facto* law and bill of attainder. After the order denying suspension of deportation was entered by the special inquiry officer on February 16, 1955, the petition for a writ of habeas corpus was amended to include the additional argument that the denial of suspension was arbitrary and capricious (R. 84, 95-96).

The District Court, after a hearing, denied the petition on March 2, 1956 (R. 84). *Niukkanen* v. *Boyd,* 148 F. Supp. 106 (D. Ore.). On February 8, 1957, the Court of Appeals affirmed. *Niukkanen* v. *Boyd,* 241 F. 2d 938 (C.A. 9). A petition for a writ of certiorari was denied on December 16, 1957 (355 U.S. 905), after this Court's decision of December 9, 1957, in *Rowoldt* v. *Perfetto,* 355 U.S. 115.

Thereafter, on December 27, 1957, petitioner sought administrative reconsideration of his status as a de-

portable alien. He claimed that the *Rowoldt* decision "so redefined the substantial and evidential requirements of membership in the Communist Party of the United States as to take petitioner out of the class of deportable aliens." This motion was denied by the Board of Immigration Appeals on March 26, 1958 (R. 9; see also R. 85).

Relying on this same ground, and renewing his contention that the statute is unconstitutional, petitioner instituted the instant judicial proceeding on April 4, 1958 (R. 3-16). After a hearing (R. 46-77), the District Court denied the petition on April 14, 1958 (R. 77-79, 81-86) and the Court of Appeals affirmed the order of the District Court (R. 99).

2. *The evidence and findings on deportability*

At the original administrative hearing commencing on May 11, 1953, in Portland, Oregon, petitioner (also known as Mackie) took the stand to confirm that he understood the nature of the charges against him, that he was born in Finland on November 24, 1908, and entered the United States in 1909, that he served 95 days in the United States Army, and that he had never been admitted to citizenship [3] (Tr. 1-9).[4] The government then called two witnesses, Walter R. P. Wilmot, a New York writer, and Lee Arthur Knipe, of Oregon.

(a). Wilmot testified that he had joined the Communist Party in Portland in 1936 or 1937 and had been very active in Party affairs until 1939 (Tr. 12, 13). He

[3] The examining officer produced a petition for naturalization which had been denied March 15, 1946, for "lack of prosecution" (Tr. 10).

[4] The transcript of the hearing before the Immigration and Naturalization Service will be referred to as "Tr. ."

described himself as having been the editor of the "Labor New Dealer" (Tr. 12), a weekly newspaper which was "Communist set-up and Communist controlled" (Tr. 15). In this capacity he attended meetings in Portland, Oregon, Seattle, Washington, and Aberdeen, Washington, of practically all branches of the Party (Tr. 13, 15).

Wilmot testified that he met petitioner in 1936 as "William Mackie" at the home of H. Burns, a Communist Party member and the secretary to Wilmot on the "Labor New Dealer" (Tr. 13, 18). At this meeting, Communist Party matters were discussed (Tr. 18). From this time until Wilmot was expelled from the Party in 1939, he knew petitioner as a member, seeing him many times. This included an occasion when he saw petitioner at party headquarters paying dues (Tr. 14, 45, 46). He saw petitioner's membership card at this time (Tr. 15, 46). He also encountered petitioner many times at the Party meetings which the witness attended three to four times a week for two years (two to three on the average which were closed to non-members) (Tr. 17, 31). The meetings were held in the Finnish Hall, at private homes, in the newspaper office, and at a library under assumed names (Tr. 31). The witness also saw petitioner at his newspaper office where petitioner came once or twice a month to aid in the circulation of the "Labor New Dealer" (Tr. 19, 20). The office was "like a branch office of headquarters" in that everything that dealt with Party matters was discussed there in a back-room closed to non-members. Petitioner took an active part in the discussions which covered Party aims and purposes, and ways of broadening the circulation of the newspaper as a Party organ (Tr. 20-22).

Wilmot further testified that petitioner attended a "plenum" in Aberdeen (Tr. 19). This was a closed meeting held for the purpose of reporting the activities of Party members in the Northwest (Tr. 19). Admission was by card presented at the door (Tr. 26). With respect to his own admission and that of petitioner, the witness said "These are the anointed people * * * When I showed up there or Mr. Mackie [petitioner], they knew who we were" (Tr. 27).

The witness said that the primary concern of his associates at this time was one leading toward revolution (Tr. 32). He said that petitioner belonged to "what we call the top fraction" of the Party (Tr. 27, 35). In his opinion, "Mackie knew where he was going" (Tr. 32).

On cross-examination, Wilmot admitted that he had been arrested and convicted for drunkenness during this period but noted that he had nevertheless held three jobs and worked sixteen hours a day (Tr. 47-50).

(b). The second witness, Lee Arthur Knipe, identified himself as having been a member of the Communist Party from 1937 to 1942, the Educational Director of Albina Branch, and a member of the County and State Executive Boards (Tr. 64, 65, 66). He testified that he had a personal association with petitioner who was also a Communist at this time (Tr. 70). He had seen petitioner pay dues and had seen his membership book several times (Tr. 69, 94, 95).

The witness said he first met petitioner at a closed Party meeting in Finnish Hall in 1937 (Tr. 66). Thereafter, he became a good friend of petitioner's (Tr. 73-74). He saw petitioner, who was a "good member" of the Albina Branch (Tr. 67) and who served on its execu-

tive board (Tr. 68), at meetings once each week (Tr. 67). The witness attended some thirty to thirty-five meetings at which petitioner was present (Tr. 67). The meetings were held in Finnish Hall and at homes of members (Tr. 67). The meetings at Finnish Hall were closed to all except members of the branch, about 25 or 35 members (Tr. 73). Petitioner attended at least three meetings in the home of the witness (Tr. 67).

Knipe said that discussions at the meetings involved matters contemplating an eventual revolution (Tr. 72). He testified that petitioner took an active part in discussions (Tr. 67), but noted that petitioner was not a Party intellectual—that he was more interested in bread and butter topics than in theory or political discussion (Tr. 75).

On direct examination, Knipe denied that he had been convicted of a felony (Tr. 64). On cross-examination, he was asked if he had ever been convicted for a violation of state law (Tr. 76). He answered with details about his arrest for violation of a traffic ordinance (Tr. 77). When counsel for petitioner indicated that he had reference to a conviction for forgery, objections and an off-the-record discussion ensued (Tr. 80). Knipe was then asked specifically if he had ever been convicted of a felony under state law (Tr. 80). He refused to answer on constitutional grounds (Tr. 80). The special inquiry officer ruled that he need not answer but informed counsel that he would consider the matter further (Tr. 81, 82). Some days later when the hearing resumed, Knipe took the stand at his own request and told of a 1929 conviction for forgery (Tr. 86), noted that he had thought it a misdemeanor because of the amount involved ($25.00), and explained

that he had not wanted the matter brought up because of his minor children (Tr. 87).

(c). At the conclusion of the government's evidence, petitioner produced several character witnesses and rested (Tr. 97-128). The inquiry officer, apprised that petitioner did not intend to testify, pointed out to petitioner and his counsel that a deportation proceeding was civil in nature and that refusal of an alien to answer questions properly put to him was legally significant.

The following colloquy took place (Tr. 128-129):

"Q. It means simply this. Two government witnesses who have appeared here have testified that they have seen you at closed meetings of the Communist Party. There has been no evidence to refute those statements and since you have refused to testify, it will have to be assumed that the statements made by those two witnesses are correct, since it has not been refuted.

"Mr. Lezak [counsel for petitioner]: I am advising Mr. Mackie at this time that he need make no further statements without consulting his attorney first."

At this time, counsel asked for a short recess during which he and petitioner left the room. Returning after five minutes, counsel said:

"After consulting with my client I have nothing further to offer."

The special inquiry officer then addressed petitioner:

"Q. Is there any statement you care to make for the record.* * *

"A. Well, everything has been said I guess, that has to be said.

"Q. There is nothing further, then, that you wish to add?

"A. Well, * * * I would make a good United States citizen if I got my citizenship papers * * * ."

(d). The special inquiry officer, on June 30, 1953, specifically found on the basis of this evidence that petitioner had been a voluntary member of the Communist Party during the years 1937-1939. With respect to the credibility of the witnesses, he noted that Wilmot had shown good response and keen intellect—that he had admitted drinking but not to the extent of impairing mental faculties or means of livelihood. The officer found that there was no reason to doubt the veracity of Knipe since he had adequately explained his reluctance to testify about his criminal conviction. He further noted petitioner's refusal to speak.

(e). The Board of Immigration Appeals (on September 8, 1953) dismissed the appeal on the ground that the record established deportability by reasonable, substantial and probative evidence. It observed that, while the credibility of the witness Knipe had been weakened because he "testified untruthfully", his testimony had been corroborated by another witness and that petitioner had not denied the correctness of this testimony (see R. 19).

3. *The evidence and findings on the application for suspension of deportation.*

(a). At the proceedings reopened on February 2, 1955, to permit petitioner to apply for suspension of deportation, he did take the stand (Tr. 184). He testified as to his early activities in various organizations. He readily recalled his membership in the Boy Scouts between 1921-1928 and the name of his scout-master (Tr. 195). He could not remember the specific years

when he was affiliated with the Finnish Federation, the Voima Sports Club, and the Unemployment Federation which he said was probably the Worker's Alliance (Tr. 195-196). He admitted that he had attended meetings and other events in Finnish Hall, having gone to the Hall the first time in 1929 or 1930 (Tr. 198, 199). He said that he had attended many meetings—"unemployment meetings, federation meetings and all kinds of meetings" (Tr. 199). He said he could not tell whether the meetings in Finnish Hall were Communist or not —that maybe they were and maybe not (Tr. 200). He admitted that he knew Lee Knipe, that he saw him maybe 150 times, but he did not remember when he first met him and did not want to make a definite statement as to whether he knew then or now whether Knipe was a member or officer in the Communist Party (Tr. 199-200). He said he did not know Wilmot and had never seen him before (Tr. 200). He denied that he had ever "knowingly" belonged, or paid money to, the Communist Party (Tr. 201, 203, 204). He said that he read the daily papers but mostly sports—not political news (Tr. 201-202).

On cross-examination, petitioner said again that he believed he had belonged to the Worker's Alliance but could not remember the specific years (Tr. 207, 208). He admitted recent activities with the Oregon Committee for the Protection of the Foreign Born (Tr. 213, 217, 222, 223, 226, 227) and said he had recently signed up for the Methodist Federation for Social Action (Tr. 216, 228). Asked who was present at meetings of the Oregon Committee for the Protection of the Foreign Born, he indicated that he did not want to give names and "make a person think I am trying to act as a

'stool pigeon' " (Tr. 217). Told that this was relevant to his application for suspension of deportation, he, after consultation with counsel, responded, explaining that the meetings centered around the McCarran-Walter Act (Tr. 222).

(b). The special inquiry officer, on February 16, 1955, denied petitioner's application for suspension of deportation. He found that, although it had been satisfactorily established that petitioner's deportation would result in unusual hardship to him, his citizen wife and step-son, that the case did not warrant suspension of deportation. He pointed out that petitioner was evasive as to his activities and associations during the period during which testimony had established he belonged to the Communist Party and contrasted his inability to recall events and people during 1930-1940 with his ready recall of earlier activities. Noting that it was a matter of policy not to grant suspension of deportation in these cases unless it had been established that the alien had made a "clean break" with the Communist Party, and in fact was actively opposed to its ideologies, he referred to petitioner's attitude as being reluctant to implicate other persons known by him to be Communists or to admit that he had been disillusioned by the Party or opposed to Communism. He noted that petitioner had turned for solace to the Oregon Committee for Protection of the Foreign Born and the Methodist Federation for Social Action.

(c). On May 13, 1955, the Board of Appeals dismissed an appeal, reviewing the entire record (R. 17). It noted, *inter alia*, petitioner's admitted affiliation with the Workers Alliance, his evasive and unresponsive testimony during the reopened hearing, and his reluc-

tance to give information as to persons attending a meeting of the Oregon Committee for the Protection of the Foreign Born. It held that there was an overwhelming amount of evidence to show that petitioner had been a member of the Communist Party, and concluded that there was nothing in the record to show that he had completely disassociated himself and no longer believed in its doctrines or principles (R. 17-23).

(d). On March 2, 1956, the District Court (*Niukkanen* v. *Boyd,* 148 F. Supp. 106), in dismissing the petition for a writ of habeas corpus, found *inter alia* that there was no basis for the contention that the denial of suspension of deportation was arbitrary and capricious. It noted that petitioner's testimony at this hearing was far from convincing. (It also found that the evidence adduced at the original immigration hearing was ample to support the findings of Party membership and disposed of contentions that the Act was unconstitutional, citing *Harisiades* v. *Shaughnessy,* 342 U.S. 580, and *Galvan* v. *Press,* 347 U.S. 522.) It recognized that deportation would cause hardship, and that the practice of deportation "bristles with severities", but observed that this was a matter solely for the responsibility of Congress.

As already indicated, the Court of Appeals affirmed on February 8, 1957 (241 F. 2d 938), for the reasons stated by the District Court, and this Court denied certiorari on December 16, 1957, 355 U.S. 905.

4. *The evidence and findings with respect to reopening on the basis of Rowoldt* v. *Perfetto*

(a). On March 26, 1958, the Board of Immigration Appeals, in denying petitioner's application for re-

opening on the basis of *Rowoldt* v. *Perfetto,* 355 U.S. 115, reviewed the evidence at both hearings; it considered the testimony regarding the extent of petitioner's activities and its credibility, the fact that he did not testify at the original hearing, and his evasive and unresponsive answers at the subsequent hearing on suspension of deportation. It concluded that "careful reconsideration of the entire record reveals an overwhelming amount of evidence" that petitioner was a member of the Communist Party from 1937 to 1939 and "that such membership on his part was a meaningful association and one which was not wholly devoid of political implications" (see R. 85).

(b). On the present petition for habeas corpus alleging *inter alia* that the finding of meaningful membership under *Rowoldt* was capricious, the District Court permitted petitioner to take the stand and produce character witnesses, although it indicated that it did not think petitioner was entitled to do so (R. 52, 60, 67). Petitioner again denied knowing Wilmot (R. 55). He denied a knowledge of Communism (R. 56, 62), said that the only thing he heard in 1938 and 1939 was not a "violent overthrow of the Government" but "more work and more food" (R. 62), denied that he had ever attended a plenum (R. 63), and admitted that he had belonged to the Worker's Alliance in 1937 (R. 63).

The District Court in its decision (R. 77, 81) noted that it had carefully reread the complete record and was convinced that petitioner did not come within the reach of *Rowoldt* (R. 81). It noted that petitioner, unlike Rowoldt whose truthfulness was unquestioned, had (since his first refusal to testify) consistently

denied membership in the Communist Party in the face of evidence to the contrary that he had been a top fraction member locally (R. 77, 82). It said that petitioner's testimony before it did not change its previous opinion that there was ample evidence to sustain the Board's findings, that it believed the testimony which established petitioner's membership in the Party and did not believe petitioner (R. 78, 83). The court expressed the opinion that the legislation under which deportation had been ordered was harsh but was outside the power of the court to consider. It concluded that there was no more merit in this petition than there was in the previous one,[5] and that the delay of some six years in this case "has been occasioned solely by Petitioner's resort to administrative and court proceedings to assert contentions which have been found to be without merit" (R. 85).

(c). The Court of Appeals, after reviewing the entire record, affirmed, concluding that the evidence of active participation by petitioner in a relatively high regional echelon of the Party "more than meets the minimum requirements of proof to establish Communist party membership, as set out in *Galvan* v. *Press,* and as referred to in *Rowoldt* v. *Perfetto* as 'meaningful association' " (R. 98).

SUMMARY OF ARGUMENT

I

In his latest attempt to prevent deportation, petitioner still attacks the sufficiency of the evidence to show that he was an alien who after entry became a

[5] This included disposition of the previously raised constitutional issues.

member of the Communist Party—a finding which has repeatedly been upheld on judicial and administrative review. His contention that his membership was not meaningful under this Court's decision in *Rowoldt* v. *Perfetto,* 355 U.S. 115, is without basis.

The proof shows that petitioner was a card-carrying, dues-paying, meeting-attending member of the Communist Party for some two years, and that he served on the local executive board and aided regularly in the distribution of a Communist-controlled newspaper. It shows further that he attended many closed meetings at which policy was discussed, that he took an active part in such discussions, and that he once attended an important regional meeting. These facts were unchallenged by petitioner at the original administrative hearing, despite urging that he meet the issue, and his subsequent testimony (on the application for suspension of deportation), which professed to deny membership, was so evasive and unresponsive as to incur disbelief. The proof was clearly sufficient to establish membership under the test of *Galvan* v. *Press,* 347 U.S. 522—that the alien of his own free will joined the Party aware that he was joining an organization known as the Communist Party which operates as a distinct and active political organization.

Rowoldt was a determination that the government's sole reliance on the testimony of that alien, which showed that he was preoccupied with purely economic sustenance, fell short of showing the necessary consciousness of political implications attendant upon meaningful Party membership. The instant case is clearly distinguishable. Consciousness of political affiliation here was more than adequately proved. It was

specifically spelled out by direct testimony that petitioner actually engaged in political discussions. There were likewise strong inferences to be drawn, as in many comparable cases, from petitioner's length of membership, his constant activity, and his position of at least local leadership.

II

The argument that the statute is unconstitutional as a bill of attainder likewise raises an issue which we believe to be firmly settled.

This Court in *Harisiades* v. *Shaughnessy,* 342 U.S. 580, and *Galvan* v. *Press, supra,* 347 U.S. 522, specifically found, and petitioner so admits,[6] that the legislation providing for deportation for past membership in the Communist Party does not offend the *ex post facto* clause or due process. Since the reasoning of these cases was based upon the well-established principle that deportation, no matter how harsh, is not punishment, it follows that these holdings necessarily dispose of the contention that the statute offends as a bill of attainder—which by definition is a legislative act inflicting *punishment* without a judicial trial.

A long history of judicial rulings upholds the right of Congress to name specific groups in deportation legislation. The present legislation was not enacted to *punish* ascertained individuals or classes but represented a considered Congressional judgment that the presence of alien residents who had previously been members of the Communist Party represented a danger to the welfare of the country.

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[6] Petitioner does not ask that *Harisiades* or *Galvan* be overruled or reconsidered (see Pet. Br. 7, 20).

ARGUMENT

In this second cycle of attacks carried through administrative and judicial tribunals, petitioner asks this Court to strike down an order of deportation issued initially some seven years ago and twice upheld by the District Court and the Court of Appeals. The issues which he now raises—the sufficiency of the evidence to show that he was an alien who after entry had become a member of the Communist Party, and the constitutionality of the Act in the light of the bill of attainder provision of the Constitution—are the precise issues which he raised in his prior petition for certiorari to this Court. See *Niukkanen* v. *Boyd,* No. 992, O.T. 1956, renumbered No. 121, O.T. 1957, certiorari denied, 355 U.S. 905. No new evidence has been adduced and petitioner's legal status remains unchanged. We submit that he has shown no valid reason for disturbing the affirmance of the judgment below.

I

The Evidence Established that Petitioner's Membership in the Communist Party was Meaningful

A. The crucial question is whether petitioner has been shown to have been a member of the Communist Party so as to render him subject to deportation under Section 22 of the Internal Security Act of 1950. The test of membership was set out in *Galvan* v. *Press,* 347 U.S. 522, where this Court, urged to construe the Act as providing for the deportation only of aliens who joined the Communist Party fully conscious of its advocacy of violence, said (at pp. 528-529):

> It must be concluded, therefore, that support, or even demonstrated knowledge, of the Communist

> Party's advocacy of violence was not intended to be a prerequisite to deportation. It is enough that the alien joined the Party, aware that he was joining an organization known as the Communist Party which operates as a distinct and active political organization, and that he did so of his own free will. * * *

Applying this test, the Court sustained the hearing officer's finding that Galvan had been a "member" of the Communist Party from 1944 to 1946 on the basis of admissions, subsequently denied, that he had joined the Party, attended meetings, and refrained from applying for citizenship for fear of exposing such membership, and on testimony of a witness that Galvan had been an officer of the Spanish Speaking Club, an alleged Communist Party unit. The Court noted that there had been no claim that membership was obtained "accidentally, artificially, or unconsciously in appearance only" (347 U.S. at 528), and concluded that the record did not show a relationship to the Party so "nominal" as not to make Galvan a "member" within the terms of the Act. 347 U.S. at 529.

This test of membership was reaffirmed in *Rowoldt* v. *Perfetto,* 355 U.S. 115, where the majority of the Court (speaking through Mr. Justice Frankfurter) observed (at p. 120): "There must be a substantial basis for finding that an alien committed himself to the Communist Party in consciousness that he was 'joining an organization known as the Communist Party which operates as a distinct and active political organization * * *'. 347 U.S. at 528"; see also the dissenting opinion, 355 U.S. at 125. In that case, however, the Court found the evidence too insubstantial to show such membership—evidence based upon the sole testimony of Ro-

woldt, that, while he had belonged to the Communist Party for a year in 1935, he viewed the Party as having one aim, "to get something to eat for the people" (355 U.S. at 117). In view of this unchallenged testimony, accompanied by statements that membership had been motivated by a "fight for something to eat and clothes and shelter" and "fighting for the daily needs", the Court declined to say that this was the "meaningful association" contemplated by the statute. The Court pointed out that from this account, "*which is all there is,* the dominating impulse to his 'affiliation' with the Communist Party *may well have been* wholly devoid of any 'political' implications" and noted that "The differences on the facts between *Galvan* v. *Press, supra,* and this case are too obvious to be detailed". 355 U.S. at 120 and 121 (emphasis added).

That *Rowoldt* did not seek to alter the test of membership announced in *Galvan* is clear, not only from the specific affirmation of that earlier ruling, but also from the reference to the distinction in the facts between the two cases. The Court in *Rowoldt* applied the principles announced in *Galvan* to a different factual situation.[7] Petitioner seeks to read *Rowoldt* as carving out an exception to the *Galvan* rule based upon an alien's motivation for joining the Party or the extent and character of his activity (Pet. Br. 17-19). We do not read *Rowoldt* as so holding. It went no further than to rule

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[7] Almost immediately after the decision in *Rowoldt*, the Court denied petitions for writs of certiorari in cases with comparable facts raising the issue of sufficiency of proof to show more than nominal membership (petitioner's case, No. 992, O.T. 1956, certiorari denied, 355 U.S. 905); *United States ex rel. Avramovich* v. *Lehmann*, 355 U.S. 905; and *Rystad* v. *Boyd*, 355 U.S. 912 (see pp. 26-27, *infra*).

that the government there—relying as it did solely upon Rowoldt's testimony, replete with references to the fight for the necessities of life—had failed to show an "awareness" of the political character of the Communist Party, the essential element of the test of *Galvan*. The Court's finding, that on the basis of the unchallenged evidence it could not say that Rowoldt had a meaningful association with the Party since his affiliation may well have been devoid of political implications, was in effect a ruling that the proof had failed to show a consciousness that the Communist Party operated as a political organization.

B. Some lower courts have specifically noted that *Rowoldt* represents no change in the law with respect to proof of membership. *Schleich* v. *Butterfield,* 252 F. 2d 191 (C.A. 6), certiorari denied, 358 U.S. 814; see the opinion below at R. 96. And all lower court rulings since *Rowoldt* have considered the total evidence in determining whether there was substantial basis for a finding of consciousness by the alien that he was joining an organization known as the Communist Party which operates as a distinct and active political organization. See, *e.g., Wellman* v. *Butterfield,* 253 F. 2d 932 (C.A. 6); *Williams* v. *Mulcahey,* 253 F. 2d 709 (C.A. 6), certiorari denied, 356 U.S. 946; *Schleich* v. *Butterfield, supra.*

The cases which have found membership so nominal or meaningless as not to be within the statute have turned upon considerations bearing on consciousness. In *Diaz* v. *Barber,* 261 F. 2d 300 (C.A. 9), an old alien laborer, who could neither read nor write and who gave confused conflicting statements about his affiliation

and extent of activity with the Party, was characterized as a "small rabbit in the Communist hutch" by the court below, relying on *Rowoldt.* And in *Bovinas* v. *Savoretti,* 146 F. Supp. 274 (S.D. Fla.), evidence that an alien who joined the Socialist Party in 1917, and who was unaware that this organization was encompassed by the Communist Party in 1922 or 1923, was found to be too nominal and innocent to establish membership under *Galvan,* citing *Colyer* v. *Skeffington,* 265 Fed. 17, 72 (D. Mass.). See also *Baghdasarian* v. *United States,* 220 F. 2d 677, where the Court of Appeals for the First Circuit vacated a judgment cancelling naturalization alleged to be fraudulently procured by an alien who denied membership in the Communist Party on the grounds that her membership had been acquired when her husband enrolled her, and this fact, coupled with her inactivity, made her membership too nominal, within *Galvan,* to show that she joined the Party.

C. In the present case, the administrative authorities were fully warranted in accepting the government's testimony which petitioner did not even undertake to deny at the original hearing despite the warning of the hearing examiner that, in the absence of refutation, the testimony would be assumed to be true. Petitioner's subsequent denial of any membership in the Communist Party in his application for suspension of deportation could, in the face of this testimony, properly be rejected as untruthful. Thus the case must be judged, with relation to the issue of meaningful membership in the Party, on the evidence of peti-

tioner's activities as described by the witnesses for the government.[8]

As the Statement, *supra,* pp. 6-11, shows, the proof at the deportation hearing was that petitioner was an active, card-carrying, dues-paying member of the Communist Party who regularly attended meetings limited to Communist Party members at which Party policies were discussed. He assisted in the distribution of the Communist-controlled trade union newspaper and participated in discussions which Party members held in the back room of the newspaper, relating to Party policy; at one time he attended a regional "plenum meeting. From this evidence, the administrative fact-finders could properly conclude that petitioner was wholly aware of the Communist Party's political character.

"Awareness" of the character of an entity is of course subjective. But its existence in relation to the problem here—the knowledge of the political character of an organization—may be proved in several ways (in the absence of a direct admission). Testimony may show that the "member" spoke with knowledge or that direct information was imparted to him; and inferences may be drawn from the length of time of his affiliation, his age, education and degree of sophistication, the extent and character of his participation and activity, and his refusal to rebut testimony. Motivation or degree of activity is but one part of the

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[8] It has some significance that the District Court, which also heard petitioner's denial of Communist Party membership (see *supra,* p. 15), stated that it did not believe petitioner's testimony (R. 78). The court also said that it believed that the testimony of Wilmot and Knipe at the administrative hearing was true (R. 78).

picture. It is the total evidence which must be examined.

The evidence did more than establish petitioner as a card-carrying Party member who regularly attended meetings over a period of some two years ending in 1939[9]; it described him as a fairly important member, belonging to the "top fraction"[10]—one who was known even at a regional meeting. It disclosed that he was a "good member" of his branch who served on the local executive board, and an "active member", not only with respect to regular attendance at meetings but in the dissemination of Communist news and the discussion of Party policy. There was no evidence that he was obsessed with economic necessity or any other consideration to the extent that it might have made him oblivious to political implications. It is true that Knipe characterized petitioner as being not a Party intellectual but "more interested" in "bread and butter" topics. However, one may be an active, knowing member of an organization without being among its theoreticians. There was testimony that petitioner did take an active part in discussions of Party aims and purposes and that he "knew where

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[9] The fact that there is no evidence of petitioner's Party membership after 1939 may well have a significance other than that petitioner left the Party at that time. In *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 593, the Court pointed that, after the decision in *Kessler* v. *Strecker*, 307 U.S. 22, in 1939, the "reaction of the Communist Party was to drop aliens from membership, at least in form, in order to immunize them from the consequences of their party membership."

[10] The contradiction in the testimony of the two witnesses which petitioner points to (Pet. Br. 18) is non-existent. Wilmot later corrected the erroneous impression which he conveyed that petitioner was a "functionary" (Tr. 15, 35).

he was going." Certainly this characterization is believable in view of the testimony regarding the many closed meetings that both witnesses said petitioner attended at which policy discussions took place.

This evidence on the issue of consciousness is more specific than the comparable evidence in *Galvan* v. *Press,* where awareness was inferred from the alien's admission, later denied, that he had refrained from applying for naturalization for fear of exposing his Party membership, and from the testimony of a witness that he had been an officer of the Spanish Speaking Club. Here, there was also testimony that petitioner actually engaged in political discussions—that he listened to many such discussions at the closed meetings he attended. Moreover, the details regarding petitioner's local leadership and constant participation make the proof comparable to that of the lower court cases since *Rowoldt* which have found, on evidence of a participant's status and activity, that he could not have been ignorant of the general means, aims, and ideals of the Communist Party. See *Wellman* v. *Butterfield,* 253 F. 2d 932 (C.A. 6); *Williams* v. *Mulcahey,* 253 F. 2d 709 (C.A. 6), certiorari denied, 356 U.S. 946; *Schleich* v. *Butterfield,* 252 F. 2d 191 (C.A. 6), certiorari denied, 358 U.S. 814; *Fougherouse* v. *Brownell,* 163 F. Supp. 580 (D. Oreg.); see also *United States ex rel. Avramovich* v. *Lehmann,* 235 F. 2d 260 (C.A. 6), certiorari denied (following *Rowoldt*), 355 U.S. 905. The proof is stronger than that in *Rystad* v. *Boyd,* 246 F. 2d 246 (C.A. 9), certiorari denied (following *Rowoldt*), 355 U.S. 912, where the evidence established simply that the alien was a card-carrying, dues-paying, meeting-

attending member of the Communist Party and the alien, like petitioner here, produced no evidence.[11]

Moreover, unlike *Rowoldt,* petitioner did not undertake to explain his participation in the Communist Party as stemming from or involving considerations other than those which would normally be inferred from the proof that he was a dues-paying, card-carrying, active, working member of the Party. Even when he testified in his own behalf at the suspension hearing he did not say that he joined the Party thinking it was a non-political organization; rather, he testified that he did not join at all. Under either of these circumstances (silence or negation), the trier of fact, on finding membership, had a right to believe that petitioner had no evidence to combat the inference of meaningful membership which would be the normal one to be drawn from the activities described by the government witnesses. Cf. *United States ex rel. Bilokumsky* v. *Tod,* 263 U.S. 149; *United States ex rel. Vajtauer* v. *Commissioner of Immigration,* 273 U.S. 103; *Rystad* v. *Boyd, supra,* 246 F. 2d 246 (C. A. 9), certiorari denied, 355 U.S. 912; *Ocon* v. *Guercio,* 237 F. 2d 177 (C. A. 9); *Quilodran-Brau* v. *Holland,* 232 F. 2d 183 (C.A. 3); *United States ex rel. Zapp* v. *District Director of Immigration and Naturalization,* 120 F. 2d 762 (C.A. 2); *United States* v. *DeLucia,* 163 F. Supp. 36 (N.D. Ill.), affirmed, 256 F. 2d 487 (C.A. 7), certiorari denied, 358 U.S. 836; *DaCosta* v. *Holland,* 151 F. Supp. 746 (E.D. Pa.); *Vlisidis* v. *Holland,* 150 F. Supp. 678 (E.D.

[11] The Board of Immigration Appeals advises that it has reexamined some twenty-five cases on the basis of *Rowoldt,* some upon its own motion. Of these, four have been terminated favorably to the alien, six were denied relief, and fifteen, at last count, were still pending.

Pa.), affirmed, 245 F. 2d 812 (C.A. 3); *Williams* v. *Butterfield,* 145 F. Supp. 567 (E.D. Mich.), affirmed, *Williams* v. *Mulcahey,* 250 F. 2d 127 (C.A. 6), certiorari denied, 356 U.S. 946; *Caetano* v. *Shaughnessy,* 133 F. Supp. 211 (S.D. N.Y.).

Intent or awareness is a matter peculiarly within the knowledge of the alien. Even in criminal cases, under these circumstances, the burden may be cast on the party having knowledge to present evidence of such facts, whether the proposition is an affirmative or a negative one. See *Yee Hem* v. *United States,* 268 U.S. 178; *Casey* v. *United States,* 276 U.S. 413, 418; *Rossi* v. *United States,* 289 U.S. 89; Wharton's *Criminal Evidence* (12th ed. 1955), Section 14. Here, the government produced evidence of activities fully supporting the conclusion that the alien was aware of the political character of the Communist Party, and the petitioner produced no evidence (other than his own unsatisfactory denial of membership) that he was unaware of the political character of the Party. The requirements of the statute have thus been met.[12]

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[12] The District Court and the Court of Appeals have twice upheld the administrative findings, the second time being after (and in the light of) *Rowoldt.* Their opinions and statements indicate that those courts have made a fair assessment of the record—the case has been gone into most thoroughly by both c rts—and have applied the proper statutory tests. There is therefore no occasion for further consideration by this Court of the administrative findings. See *Peurifoy* v. *Commissioner,* 358 U.S. 59, 61; *Federal Trade Commission* v. *Standard Oil Co.,* 355 U.S. 396, 400-401; *Labor Board* v. *Pittsburgh S.S. Co.,* 340 U.S. 498, 502-503. See also *supra,* p. 19.

II

The Statute does not Violate the Bill of Attainder Clause of the Constitution

Petitioner argues that Section 22 of the Internal Security Act of 1950 violates the bill of attainder provision of Article I, Section 9, Clause 3, of the Constitution. He expressly concedes (Pet. Br. 7) that all other constitutional issues involving this statute were settled by this Court in *Galvan* v. *Press,* 347 U.S. 522, and *Harisiades* v. *Shaughnessy,* 342 U.S. 580—and does not ask that those decisions be overruled or reconsidered (see Pet. Br. 7, 20) [13]—but argues that this precise issue has never been passed upon by this Court.

It is the government's position that, while the Court in *Galvan* did not expressly mention the bill of attainder clause in its decision, its holding (like the previous ruling in *Harisiades*)—that a statute providing for deportation for past membership in the Communist Party (even though the alien might have been unaware of the Party's advocacy of violence) does not offend the *ex post facto* clause or due process—necessarily disposed of the contention that it is a bill of attainder. This conclusion is buttressed by the fact that the issue now raised was briefed at length in *Galvan* (No. 407, O.T. 1953, Brief for Petitioner, pp. 53-57; Brief for Respondent, pp. 63-66).

A bill of attainder is a legislative act inflicting punishment without a judicial trial. *United States* v. *Lovett,* 328 U.S. 303, 315. As the Court has held again

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[13] The government's arguments on the constitutionality of the statute are set forth in detail in our briefs in *Harisiades* and *Galvan,* and in our Supplemental Brief for the Respondent on Reargument in *Rowoldt* (No. 5, O.T. 1957).

and again, deportation may be harsh, drastic, and severe, but it is not a criminal proceeding and it is not a punishment. *Carlson* v. *Landon,* 342 U.S. 524, 537; *Harisiades* v. *Shaughnessy,* 342 U.S. 580, 594-595. See also *Mahler* v. *Eby,* 264 U.S. 32, 39; *Fong Yue Ting* v. *United States,* 149 U.S. 698, 709, 730; *Bugajewitz* v. *Adams,* 228 U.S. 585, 591; *Wong Wing* v. *United States,* 163 U.S. 228, 237. The bill of attainder cases *(Cummings* v. *Missouri,* 4 Wall. 277; *Ex parte Garland,* 4 Wall. 333), on which reliance is placed, have been explained by the Court as proceeding "from the view that novel disabilities there imposed upon citizens were really criminal penalties for which civil form was a disguise" and "have never been considered to govern deportation," *Harisiades* v. *Shaughnessy,* 342 U.S. at 595. And the specific holdings in *Harisiades, Marcello,*[14] *Galvan, Catalanotte,*[15] *Carson,*[16] *Mahler,* and *Bugajewitz* that deportation is not a punishment for the purpose of the *ex post facto* clause, also dispose of the contention that a deportation statute can be a bill of attainder which necessarily inflicts punishment. See the concurring opinion in *United States* v. *Lovett,* 328 U.S. at 323.

Moreover, deportation is one legislative field in which there is a long history of naming specific groups—especially the Chinese and the anarchists. Of the Chinese deportation cases, *Wong Wing* v. *United States,* 163 U.S. 228, contrasting deportation of the Chinese and their punishment by imprisonment, most aptly demonstrates the inapplicability of the bill of at-

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[14] *Marcello* v. *Bonds,* 349 U. S. 302.

[15] *Mulcahey* v. *Catalanotte,* 353 U.S. 692.

[16] *Lehmann* v. *Carson,* 353 U.S. 685.

tainder clause to deportation. A resident alien Chinese was summarily sentenced to 60 days at hard labor and then ordered deported, under the statute involved in *Fong Yue Ting* v. *United States,* 149 U.S. 698, for having been found in the United States without a certificate of residence. The sentence of imprisonment was condemned as punishment without a judicial trial. "It is not consistent with the theory of our government that the legislature should, after having defined an offence as an infamous crime, find the fact of guilt and adjudge the punishment by one of its own agents." 163 U.S. at 237. But the deportation of Chinese was upheld, following *Fong Yue Ting* on the ground that "No limits can be put by the courts upon the power of Congress to protect, by summary methods, the country from the advent of aliens whose race or habits render them undesirable as citizens, or to expel such if they have already found their way into our land and unlawfully remain therein." 163 U.S. at 237. Deportation was not to be considered as punishment.

Even if, despite this history and the Court's prior rulings, each deportation provision is to be individually tested to see whether it is an attempt to inflict punishment, Section 22 is valid. *Harisiades* establishes that there is a sufficient connection between past membership in the Communist Party and present desirability as a resident for Congress to take action to expel such aliens, not as punishment, but in order to rid the country of a potential threat. 342 U.S. at 590-591, 595-596. That is what Congress sought to do in the 1940 Act and also in the 1950 legislation. The legislative history of both statutes establishes that Congress thought the residence in this country of aliens who had

previously been members of the Communist Party was undesirable and dangerous. See *Harisiades,* 342 U.S. at 590; *Galvan,* 347 U.S. at 529. There was no purpose or attempt to punish. The history of the provision extends over a period of more than 40 years and this history shows that it is a direct method of accomplishing the Congressional objective of terminating the residence of such aliens, not an indirect attempt to reach some other result. Five distinct Congresses, in 1918, 1920, 1940, 1950, and 1952, have legislated in this field. It cannot be said that this law was enacted, as were the Civil War statutes and the one involved in *United States* v. *Lovett,* 328 U.S. 303, to *punish* ascertained individuals or classes. Rather, the statute is a deliberate Congressional judgment that a particular class of aliens represents a danger to the welfare of the country and that its license to remain here should be revoked. Cf. *Hawker* v. *New York,* 170 U.S. 189, 196-197.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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MOTION

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IN THE

Supreme Court of the United States

October Term, 1959

No. 130

WILLIA NIUKKANEN, also known as WILLIAM NIUKKANEN, also known as WILLIAM ALBERT MACKIE,

Petitioner,

v.

EUGENE D. McALEXANDER, Acting District Director, District 31, Immigration and Naturalization Service,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

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No. 130

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v.

UGENE D. MCALEXANDER, Acting District Director, District 31, Immigration and Naturalization Service,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The National Lawyers Guild moves for leave to file a rief as amicus curiae.[1] This application is made because etitioner's brief is limited to a discussion of only two spects of the case: (1) Whether 8 U. S. C. § 1251 a) (6) (C)[2] violates the Constitution by reason of being

[1] While the time to file this brief has expired, it is believed that he importance of the issues justifies the granting of the motion.

[2] The warrant of arrest upon which the proceedings in this case re based was issued prior to the passage of Section 241 of the mmigration and Nationality Act of 1952, 66 Stat. 163, 205, the ection referred to in the petition and brief. Apparently these proeedings are based on Section 22 of the Internal Security Act of 950, 64 Stat. 987, 1006, as amended by Section 1 of the Act of March 8, 1951, 65 Stat. 28, which was repealed by, but substantially eenacted in, the Immigration and Nationality Act of 1952, 8 J. S. C., Sec. 1251(a)(6)(C). In any event, the position urged n this brief would be equally applicable to Section 241(a)(6)(C) f the 1952 Act, and to Section 22 of the Internal Security Act. See *Niukkanen* v. *McAlexander,* 265 F. 2d 825, n. 1.

a bill of attainder (Petitioner's Brief, 7); and (2) Whether petitioner's alleged association with the Communist Party * * * was "meaningful" and "political" within the rule of *Rowoldt* v. *Perfetto,* 355 U. S. 115 (Petitioner's Brief, 3, 17).

Certiorari was sought and granted, however, upon the broader grounds of asserted unconstitutionality of the statute as violative of due process, as infringing the freedom of speech, and as being an *ex post facto* law (Pet. for Cert., 3, 5).[3] Since this Court's decision in *Harisiades* v. *Shaughnessy,* 342 U. S. 580, and *Galvan* v. *Press,* 347 U. S. 522, extensive legal research, to be referred to and discussed in the appended brief, is believed to justify amicus curiae in urging a reconsideration of the constitutional issues underlying these two decisions, and the decision of the Court in *Carlson* v. *Landon,* 342 U. S. 524. Counsel believe it can be demonstrated that, while broad and sweeping language has been used by the Court on occasion to uphold the exclusion and deportation of aliens in particular cases, and while it has been suggested that the power of Congress with respect to the deportation of aliens is unlimited except for the requirements of procedural due process, the asserted power of *banishment,*[4] as distinguished from the power of *delayed exclusion, i.e.* "ejection", is of relatively recent origin.

Counsel further believe that the appended brief may be of assistance to the Court in considering the question

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[3] See *Niukkanen* v. *Boyd,* 241 Fed. 2d 938 (9th Cir. 1957), affirming without opinion 148 Fed. Supp. 106 (D. C., Ore. 1956); cert. den. 355 U. S. 905.

[4] "Banishment", as here used, is intended to refer solely to the expulsion of the lawfully admitted long term resident alien as distinguished from the expulsion of an alien who either entered illegally, or who, within a reasonable time after entry, committed acts justifying a conclusion that his entry was erroneously permitted. The latter situation is hereinafter termed "ejection".

of whether the expulsion of a long term lawfully admitted alien—banishment—is punishment. While the constitutional implications of this question are raised by petitioner in the discussion of what constitutes a "bill of attainder" (Petitioner's Brief, 14), it is believed that the appended discussion may be of additional assistance to the Court.

The correct constitutional determination of the issues presented upon this petition are of importance not only to the millions of lawfully admitted permanent resident aliens, but also, and perhaps primarily, to the nation as a whole in its relationship to the world family of nations. Banishment is "universally decried by civilized people", *Trop* v. *Dulles*, 356 U. S. 86, 102 (opinion of Warren, C.J.). While the position here sought to be presented by amicus curiae is a constitutional position, not a policy question, the results of the determination may be far-reaching. Certainly the importance of this issue justifies a reconsideration of the *Carlson, Harisiades* and *Galvan* cases.

The National Lawyers Guild, a national bar association particularly concerned with the preservation and extension of constitutional civil liberties, is concerned that in an area where basic human rights and the disposition of human lives are deeply involved, the most searching constitutional analysis should be applied and reapplied to a procedure which repeatedly produces results universally recognized as inhumane, harsh, brutal and shocking.

For these reasons the National Lawyers Guild moves for leave to file the following brief as amicus curiae.[5]

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[5] The written consent of petitioner to the filing of this amicus brief has been obtained. The consent of respondent has been denied by letter, a copy of which *amicus curiae* is filing with this brief.

BRIEF OF *AMICUS CURIAE*

Preliminary Statement of the Case

Section 22 of the Internal Security Act of 1950, 64 Stat. 987, 1006, provides for the deportation of any alien who at any time has been a member of the Communist Party. Petitioner entered the United States in 1909 at the age of ten months. He has resided in this country continuously since his entry. He had brief but honorable service in the United States Army during the Second World War. He is the head of a family consisting of his citizen wife and her sixteen year old son by former marriage. (*Niukkanen* v. *McAlexander,* 265 F. 2d at 826).

After an administrative hearing in deportation proceedings commenced in 1952, a special inquiry officer determined that he was deportable as one who had been a member of the Communist Party during the years 1937 to 1939 (265 Fed. 2d at 826). Petitioner, testifying in his own behalf, categorically denied that he had ever been a member of the Communist Party. However, in the view of the Court below "the evidence more than meets the minimum requirements of proof to establish Communist Party membership * * * " (265 Fed. 2d at 829).

POINT I

Application of the statute has resulted here in a judgment of banishment against petitioner, which exceeds the inherent constitutional limits of the power to expel.

While it has been said the "Government's power to terminate its hospitality has been * * * sustained by this Court since the question first arose," *Harisiades* v. *Shaughnessy,* 342 U. S. 580, 587, a careful analysis of the cases

relied on in that case,[6] taking into consideration their particular facts, the historical and statutory setting in which they arose, the contentions advanced by the parties, and the issues which divided the Justices in their determination, reveals that in each such case, the Court was dealing with what was, in effect, "delayed exclusion". That is, the alien was ejected upon determination of facts which showed, or which were conclusively presumed to show, that his habits, characteristics, conditions, or circumstances as at the time of entry, or the manner of his entry, would have, if known at the time, justified exclusion.

Thus in *Fong Yue Ting* v. *United States,* 149 U. S. 698, a Chinese was deported because he had not complied with a condition imposed on the entry of Chinese, namely, that they obtain certificates of residence.

Lem Moon Sing v. *United States,* 158 U. S. 538, was an exclusion case.

Li Sing v. *United States,* 180 U. S. 486, involved a Chinese whose entry was fraudulent.

Fok Young Yo v. *United States,* 185 U. S. 296, The *Japanese Immigration* Case, 189 U. S. 86, and *United States* v. *Ju Toy,* 198 U. S. 253, were also exclusion cases.

In *Zakonaite* v. *Wolf,* 226 U. S. 272, *Tiaco* v. *Forbes,* 228 U. S. 549, and *Bugajewitz* v. *Adams,* 228 U. S. 585, the basic question was not reconsidered, in different terms.

Indeed, when the first case arose which might properly be considered a deportation case, *Pearson* v. *Williams,* 202 U. S. 281, the order was sustained solely on the theory that the original entry was only conditional and could be revoked on a showing that the alien never should have been admitted. It is significant that nowhere in Justice Holmes' opinion in that case does he rely on the general power to banish.

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[6] These are cited in footnote 11, 342 U. S. 587.

Moreover, such analysis indicates that the constitutional delegation of power believed to sustain deportation statutes was implied from the power to exclude; and that the power to exclude derived primarily from the express delegation of power to regulate commerce with foreign nations. *Ekiu* v. *United States,* 142 U. S. 651, 659.

Thus, just as Congress has the power to maintain control over the importation of goods prior to their merging with the domestic economy, *Hilton* v. *Merritt,* 110 U. S. 97, so also it had "the power to retain control over aliens *long enough to make sure of the facts.*" *Keller* v. *United States,* 213 U. S. 138, 149-50 (dissenting opinion of Mr. Justice Holmes; emphasis added).

The essence of the position here presented is set forth in the opinion in *Keller,* just referred to, and which is quoted at some length to provide an understanding of Mr. Justice Holmes' true position.

> "For the purpose of excluding those who unlawfully enter this country Congress has power to retain control over aliens long enough to make sure of the facts * * * To this end *it may make their admission conditional* for three years * * * If the ground of exclusion is their calling, practice of it within a short time after arrival is, or may be, made evidence of what it was when they came in. Such retrospective presumtions are not always contrary to experience or unknown to the law * * * If a woman were found living in a house of prostitution within a week of her arrival, no one, I suppose, would doubt that it tended to show that she was in the business when she arrived. But how far back such an inference shall reach is a question of degree like most of the questions of life. And, while a period of three years seems to be long, I am not prepared to say, against the judgment of Congress, that is too long.
>
> "[I]t is fair to observe that the presumption * * * is not open to rebuttal. I should be prepared to accept even that, however, in view of the difficulty of proof in such cases. Statutes of which the justifi-

> cation must be the same are familiar in the States. * * * It is true that * * * [ordinarily] in such instances the legislature has power to change the substantive law of crimes, and it has been thought that when it is said to create a conclusive presumption as to a really disputable fact, the proper mode of stating what it does * * * is to say that it has changed the substantive law. * * * This may be admitted without denying that considerations of evidence are what lead to the change. And if it should be thought more philosophical to express this law in substantive terms, I think that Congress may require, as a condition of the right to remain, good behavior for a certain time, in matters deemed by it important to the public welfare and of a kind that indicates a preexisting habit that would have excluded the party if it had been known. * * * "

We submit that the position outlined by Mr. Justice Holmes in *Keller* correctly and succinctly defines the proper source and limit of Congressional power. Most of the actual deportations which have been approved in this Court are consistent with this "conditional entry" principle, although the statutes upon which they have been based and the Court's language in sustaining them have tended to blur and obscure the constitutional source of the power to deport. Only in recent decisions has the Court approved actual *banishment*: that is, the expulsion of a lawfully admitted permanent resident alien for causes which cannot be rationally related to circumstances or conditions which may be presumed to have existed at or prior to entry.[7]

Harisiades and *Galvan* were the first and last decisions of this Court to approve banishment in the face of a constitutional challenge. Thus, while the language of previous

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[7] *Costanzo* v. *Tillinghast*, 287 U. S. 341, was the first of the decisions in which the Court clearly upheld banishment, in the sense that Costanzo had entered as a child. He was deported for operating a house of prostitution as an adult. "A claim of violation of constitutional rights made in the court below (was) * * * abandoned." 287 U. S. at 342.

decisions seems consistent with the opinions in those cases, the ultimate decisions are a significant departure in fact, if not in theory, from previous decisions of the Court.

A re-examination of the source and limits of the constitutional power sought to be exercised in the expulsion of lawfully admitted, permanently resident aliens should be undertaken by this Court. The application of the "conditional entry" theory of the constitutional power to deport would reaffirm the full control of Congress over the immigration, and recognize power to remove those entrants who, within a reasonable time after entry are found to be undesirable. At the same time, the shocking brutality of banishment of lifetime resident aliens will be prevented.

The demonstration of what is believed to be this gradually developed, but now fully matured error as contrasted to the position of Mr. Justice Holmes has been the subject of research and analysis on the part of one of the signatories of this brief, involving several years. This has been, and is being published in a recent and the forthcoming issue of Yale Law Journal under the title, *The Constitutional Status of the Lawfully Admitted Permanent Resident Alien.*[8] Forty reprints of the article will be available as soon as the December issue of the Yale Law Journal is printed, and they will be submitted to the Clerk to be incorporated by reference as a part of this brief.

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[8] Hesse, *The Constitutional Status of the Lawfully Admitted Permanent Resident Alien*: The Pre-1917 Cases, 68 Yale L. J. 1578, which will hereinafter be cited, Hesse, The Pre-1917 Cases, 68 Yale L. J. 1578; and Hesse, *The Constitutional Status of the Lawfully Admitted Permanent Resident Alien*: *The Inherent Limits of the Power to Expel*, 69 Yale L. J. —, to be published in December, and which will hereinafter be cited as Hesse, The Inherent Limits of the Power to Expel.

POINT II

Deportation of a lawfully admitted permanent resident alien for conduct having no relationship to any circumstance of his entry, or to his condition, habits, or character at the time of entry, in fact constitutes punishment.

Such deportation has been described as harsh, cruel and inhumane as any punishment practiced in a civilized nation. *U. S. ex rel. Klonis* v. *Davis,* 13 F. 2d 630, 631 (2nd Cir., 1926). The applicability of Article 1, section 9 of the Constitution, prohibiting *ex post facto* laws, and bills of attainder, and of the Eighth Amendment, prohibiting cruel and unusual punishment, is to be determined by the nature and relationship of the sanction imposed to the end sought to be accomplished, *i.e.,* whether regulatory and compensatory, or primarily punitive. *United States* v. *Lovett,* 328 U. S. 303; cf. *Speiser* v. *Randall,* 357 U. S. 513.

At least in the case of those ordered deported for conduct not shown to be anything but innocent when engaged in, cf. *Schware* v. *Board of Bar Examiners,* 353 U. S. 232, 244-46, but retrospectively proscribed, and those who by reason of virtual lifetime residence are aliens only by "legal imputation", (Judge Learned Hand) *U. S. ex rel. Mignozzi* v. *Day,* 51 Fed. 2d 1019, 1021 (2nd Cir., 1931) the legal fiction, that banishment is not punishment, should be discarded in the face of the brutal reality that punishment without judicial trial, punishment for past innocent conduct, and the cruel punishment of permanent exile, are inconsistent with Article I, section 9, of the Constitution, and with the Eighth Amendment.

The Justices of this Court have on many occasions recognized deportation as in fact a punishment or penalty equivalent to banishment and exile: " * * * [Deportation] is undoubtedly a harsh sanction that has a severe penal effect. * * * " *Trop* v. *Dulles,* 356 U. S. 86, 98 (Chief Jus-

tice Warren); "To banish [aliens] from home, family, and adopted country is punishment of the most drastic kind. * * * " *Lehmann* v. *United States,* 353 U. S. 685, 691 (Mr. Justice Black)." * * * [The] intrinsic consequences of deportation are * * * close to punishment for crime. * * * " *Galvan* v. *Press,* 347 U. S. 522, 531 (Mr. Justice Frankfurter). " * * * [A] life sentence of exile from what has become home, of separation from his established means of livelihood for himself and his family of American citizens * * * is a savage penalty." *Jordan* v. *DeGeorge,* 341 U. S. 223, 243 (Mr. Justice Jackson). " * * * [The] doom of deportation * * * in the case of those whose lives have been intimately tied to this country * * * [requires, in the case of an ambiguous statute, that] permissible construction consonant with humane considerations". *United States ex rel. Eichenlaub* v. *Shaughnessy,* 338 U. S. 521, 533-4 (Mr. Justice Frankfurther). " * * * [Deportation] may result * * * in loss of both property and life; or of all that makes life worth living." *Ng Fung Ho* v. *White,* 259 U. S. 276, 284 (Mr. Justice Brandeis).

Judge Learned Hand in *DiPasquale* v. *Karnuth,* 158 F. 2d 878, 879 (2nd Cir. 1947), stated that the deportation of one who "had come here as a boy" * * * was "in substance [exile]". In *United States ex rel. Klonis* v. *Davis,* 13 F. 2d 630, 631, he said, "Deportation [whether the alien came here in arms or at the age of ten] is to him a dreadful punishment, abandoned by the common consent of all civilized people * * * [That] our reasonable efforts to rid ourselves of unassimilable immigrants should in execution be attended by such a cruel and barbarous result should be a national reproach."

President Truman's Commission on Immigration and Naturalization included in its report a section entitled "Deportation as Punishment", stating in part, "In 1910 a statute was passed sanctioning the expulsion at any time of an alien identified with the business of prostitution.

Eventually the concept of deportation as punishment spread rapidly; today it is predominant in the deportation statutes." *Whom Shall We Welcome,* 200 (1953).

Notwithstanding such continued recognition that deportation when it amounts to banishment is a cruel and inhuman (if, unfortunately, not sufficiently unusual) punishment, the Court has upheld such banishments four times in the past eight years in the face of the contention that the action constituted attainder, an *ex post facto* law, and cruel and unusual punishment. *Harisiades* v. *Shaughnessy,* 342 U. S. 580; *Galvan* v. *Press,* 347 U. S. 522; *Marcello* v. *Bonds,* 349 U. S. 302; *Lehmann* v. *United States,* 353 U. S. 685.

In these cases the right of "Congress to legislate retrospectively" in non-criminal matters (*Lehmann*) is described as an "unbroken rule of this court" (*Harisiades*) "which has been followed from earliest times" (*Galvan*). The precedent cases which are said to close the issue, *Bugajewitz* v. *Adams,* 228 U. S. 585, 591, and *Mahler* v. *Eby,* 264 U. S. 32, 39,[9] will not sustain the weight thus thrust upon them.

While *Bugajewitz* has been frequently cited as authority for the proposition that Article I, Section 9 of the Con-

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[9] Mr. Justice Jackson in *Harisiades,* 342 U. S. at 594, n. 22, also cited *Fong Yue Ting* v. *United States,* 149 U. S. 698, 730 and *United States ex rel. Bilokumsky* v. *Tod,* 263 U. S. 149, Mr. Justice Frankfurter in *Galvan,* 347 U. S. at 532, cited *Ng Fung Ho* v. *White,* 259 U. S. 276, 280, and Mr. Justice Whitaker in *Lehmann* cited, in addition, *United States ex rel. Eichenlaub* v. *Shaughnessy,* 338 U. S. 521, *Harisiades, Galvan* and *Marcello* v. *Bonds,* 349 U. S. 302. Apparently *Fong Yue Ting, Bilokumsky* (involving a presumption of alienage from silence at a deportation hearing) and *Ng Fung Ho,* were cited as authority that deportation proceedings are civil in character. The only other pre-*Harisiades* case cited, *Eichenlaub,* was decided without reference to the "ex post facto" clause, but as previously noted, the dissenters, including Mr. Justice Frankfurter, refer to deportation in terms of punishment.

stitution has no application to deportation laws *generally*, it is, to say the least, questionable authority for that proposition. The warrant of arrest in *Bugajewitz* recited that "she was then [August 3, 1910] a prostitute and inmate of a house of prostitution, and that she was a prostitute at the time of entry, and entered the United States for purpose of prostitution, or for immoral purpose". 228 U. S. at 590. Her answer denied that she was a prostitute at the time of entry or that she entered to practice prostitution. Apparently, the question of an *ex post facto* application of the Act of March 26, 1910, was not raised by counsel for Bugajewitz. The constitutional question, which counsel attempted unsuccessfully to reopen, was whether Congress could delegate to administrative officers the authority to make determination of facts which if established would constitute a crime, or whether such determination must be made by the "judicial power". 57 L. Ed. 978, 979. The discussion as to whether the Act of March 26, 1910, was *ex post facto* legislation as applied to appellant, not raised by her counsel, was actually raised *by the Government instead*. *Johannessen* v. *United States*, 225 U. S. 227, 242, and *Fong Yue Ting*, *supra*, were cited as authority for the proposition that as applied the statute had no retrospective effect.

Since *Johannessen* was a denaturalization case involving citizenship obtained by fraud through false representations as to length of residence, and since *Fong Yue Ting* on its facts involved only the mode of proving legal entry the statement that "the prohibition of *ex post facto* laws * * * has no application * * * and with regard to petitioner, it is not necessary to construe the statute as having any retrospective effect" could well indicate that Bugajewitz was viewed by Mr. Justice Holmes as an "erroneously admitted alien", subject to ejection because of habits or characteristics present, but not discovered, at the time of entry.[10]

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[10] Hesse: Pre 1917 cases, 68 Yale L. J. 1578, 1621-25.

The other pre-*Harisiades* case involving the application of the "ex post facto" prohibition to deportation, *Mahler* v. *Eby,* 264 U. S. 32, was decided in favor of the alien's right to remain in the United States. However, the Court's opinion upheld the validity of the act which authorized deportation of aliens found to be "undesirable residents" as persons convicted under the Espionage Act in effectuating removal for war time acts.

In any event, these two cases, neither of which involved banishment, and one of which involved a prostitute of a little over five years residence, and the other a war measure, do not hold the broad and persuasive authority assigned to them in *Harisiades* and *Galvan.* Certainly they are not authority to authorize the banishment of a lifetime resident alien in the face of constitutional inhibitions against punishment by an *ex post facto* law, a bill of attainder, or by cruel and unusual measures.

Even if the question of whether the *ex post facto* prohibition applies to non-criminal laws is closed,[12] and even if this clause is not applicable to a deportation statute which inflicts punishment retrospectively on conduct innocent at the time it occurred, such a construction can not logically be placed upon the prohibition against bills of attainder. The essence of a bill of attainder is that it inflicts punishment upon a named individual, or upon an easily ascertainable group without judicial trial.[13] As the subject has been dealt with by petitioner, we are not here developing it further.

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[11] Hesse: Pre 1917 cases, 68 Yale L. J. 1578, 1584-86. Hesse: The Inherent Limits of the Power to Expel, 69 Yale L. J. text at notes 44 to 47.

[12] But see the dissenting opinion of Mr. Justice Douglas in *Marcello* v. *Bonds,* 349 U. S. at 319-20.

[13] See *The Constitutional Prohibition of Bills of Attainder: A Waning Guaranty of Judicial Trial,* 63 Yale L. J. 844.

The "fact of punishment" unconstitutionally inflicted in the guise of civil sanctions was recognized in *Speiser* v. *Randall,* 357 U. S. 513, where a taxpayer was required to execute an expurgatory oath in order to avoid paying a higher rate of taxes than those taking the oath. The Court held the statute in question violative of due process, by enforcing on the taxpayer the duty of proving himself "not guilty." Compare *Ex parte Garland,* 4 Wall. 333; *Cummings* v. *Missouri,* 4 Wall. 277.

Similarly, an applicant for admission to the Bar may not consistent with due process be prevented from practising his profession solely, or primarily, because of his membership in the Communist Party some twenty years earlier from 1934 to 1939 where the record is barren of any evidence that such membership constituted more than an unorthodox political faith. *Schware* v. *Board of Bar Examiners,* 353 U. S. 232, 244 to 246. Evidence of such past membership cannot justify the sanction of a conclusive presumption of bad moral character, so as to deny to an applicant the right to practice law. *Konigsberg* v. *State Bar of California,* 353 U. S. 252. The statutes and rules construed in these cases were not tested against Article I, section 9, of the Constitution, but rather against the due process clause of the Fourteenth Amendment. The path taken to reach the result is, however, strikingly similar to that involved in *Cummings* and *Garland.* In all cases where a right or privilege is withdrawn, or to be withdrawn, because of past conduct asserted to justify such sanction without judicial trial, shifting the burden from the Government to the one asserting the right or privilege, the result is punishment and the legislation invalidated.

Where the regulatory element of the sanction invoked is minimal, where the penalty is maximal, as it always is in cases of banishment, and especially where the conduct sought to be penalized was non-culpable when it occurred, the fact of punishment should be recognized. The protec-

tion of the constitutional prohibitions against such punishment should be invoked on behalf of the alien to protect him from the rigors of a fluctuating legislative policy which subject him to cruel and inhuman punishment for non-culpable conduct which occurred long in the past.

Article 1, section 9, and the Eighth Amendment, should prevent petitioner's banishment from his real home and an enforced exile in an alien land.

CONCLUSION

It is respectfully submitted that the judgment of the lower court be reversed.

Respectfully submitted,

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